SUPERIOR COURT OF THE STATE OF DELAWARE

RICHARD F. STOKES

JUDGE

SUSSEX COUNTY COURTHOUSE 1 THE CIRCLE, SUITE 2 GEORGETOWN, DE 19947 TELEPHONE (302) 856-5264

February 18, 2014

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RE: Angeline M. Solway v. Kent Diagnostic Radiology Associates, P.A., Michael Polise, D.O., Martin G. Begley, M.D., Thomas Vaughan, M.D., Raphael Caccese, Jr., M.D., Bayhealth Medical Center, Inc. d/b/a Kent General Hospital, Carlos A. Villalba, M.D. and Inpatient Services of Delaware, P.A. C.A. No. S11C-01-022 RFS

Dear Counsel:

Before the Court is the Motion to Exclude Dr. Keith D. Hornberger, B.S.R.T., M.B.A., D.H.A., FACHE ("Hornberger") as an Expert Witness Regarding Any and All Issues Relating to the Care Provided by Defendant Carlos A. Villalba, M.D. ("Dr. Villalba") on the claims of Plaintiff Angeline M. Solway ("Solway"). This Motion is **DENIED**.

Facts & Procedural Background

This is a medical malpractice case in which Solway alleges that she received negligent care rising to the level of punitive conduct from a host of physicians at

Bayhealth Medical Center's ("Bayhealth's") Kent General Hospital ("Kent General") in Kent County, Delaware from Monday, January 26, 2009 to Monday, February 2, 2009. Despite subsequent care she received at Christiana Hospital's ("Christiana") Christiana Care Health Services from February 2, 2009 to Tuesday, February 17, 2009, Solway was rendered a functioning paraplegic.

In its memorandum opinion denying the Motion for Partial Summary Judgment of Defendants Kent Diagnostic Radiology Associates, P.A. ("KDRA"), Thomas Vaughan, M.D. ("Dr. Vaughan"), and Martin Begley, M.D. ("Dr. Begley") (collectively "the Radiology Defendants") on the claims of Solway, the Court extensively laid out the facts of this case.¹ As this litigation deals with one set of factual circumstances, the Court will not repeat those facts.

Although not a medical doctor, Hornberger holds a doctorate in health administration. Solway claims, however, that he has extensive experience in the functioning of hospitals, including radiology departments. Also, one of Solway's experts, Franklin A. Michota, M.D. ("Dr. Michota"), a hospitalist who is board-certified in internal medicine, agrees with Hornberger's opinions as they relate to Dr. Villalba.

In his report, Hornberger criticized Dr. Villalba's failure to follow up on the

¹ *Solway v. Kent Diagnostic Radiology Assocs., P.A.*, C.A. S11C-01-022 (Del. Super. Feb. 18, 2014) (denying the Radiology Defendants' Motion for Partial Summary Judgment).

MRI once he made the order. Hornberger noted that an ordering physician, just like a radiologist, is responsible for ordered tests. Ultimately, he concluded that "[i]t seem[ed] that there existed a conscious disregard for appropriate care, including Dr. Villalba, on the part of all concerned. There was a call for a response and no one took action. There needed to be an effort and no one showed any effort."²

As noted, the Court, in a memorandum opinion, denied the Motion for Partial Summary Judgment of the Radiology Defendants on the claims of Solway.³ The Court also denied the Motion for Partial Judgment of Dr. Villalba on Solway's claims in a memorandum opinion.⁴

Analysis

Parties' Contentions

Dr. Villalba begins his argument by noting that Hornberger is not a medical doctor, has never been qualified in a court proceeding to testify as to the standard of care relevant to a medical doctor, and has not evaluated Dr. Villalba's conduct based on the totality of the circumstances relating to Dr. Villalba's medical knowledge of and care rendered to Solway. Dr. Villalba asserts that Hornberger admitted that Hornberger did not know of what Dr. Villalba was aware regarding the results of the

² Hornberger Rep. at 4.

³ Solway, C.A. S11C-01-022.

⁴ Solway v. Kent Diagnostic Radiology Assocs., P.A., C.A. S11C-01-022 (Del. Super. Feb. 18, 2014) (denying Dr. Villalba's Motion for Partial Summary Judgment).

MRI or other tests. Also, Dr. Villalba notes that Hornberger has only testified as an expert once, and that was a case involving hospital billing. Dr. Villalba asserts that the Delaware Code,⁵ as well as Delaware Rules of Evidence⁶ bar Hornberger's testimony. Additionally, Dr. Villalba notes that this Court has ruled before that although a person is a professional, that person might not be qualified to opine as to the standard of care of another profession.⁷

Solway argues that just because Hornberger is not a medical doctor does not require that he be precluded from testifying as an expert regarding Dr. Villalba's conduct. Hornberger, she claims, has been employed in the medical industry for over forty years, which included experience in hospital policies and practices in general and the management of radiology departments. Significantly, Solway states that Hornberger does not opine on the quality of any medical procedure or treatment which Dr. Villalba rendered. Rather, Hornberger opines that when a physician orders a diagnostic study from a radiology department, that physician shares in the

⁵ See 18 Del. C. § 6854 ("No person shall be competent to give expert medical testimony as to applicable standards of skill and care unless such person is familiar with the degree of skill ordinarily employed in the field of medicine on which he or she will testify.").

⁶ See D.R.E. 702 ("If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.").

⁷ See Friedel v. Osunkoya, 994 A.2d 746 (Del. Super. 2010).

responsibility of obtaining the results.⁸ Hornberger's expertise relates to a hospital's functioning; thus, he is qualified to testify as to the lack of communication between Dr. Villalba and the Radiology Defendants. Furthermore, Hornberger's opinion is supported by the fact that Dr. Michota, a medical doctor, agrees with his opinion.

Discussion

The Court agrees with Solway's position. It is true that expert testimony as to the standard of care regarding a physician is a delicate matter. In *Friedel v. Osunkoya*, this Court firmly held that a pharmacist/pharmacologist, who was not a physician, could not offer a standard of care opinion in relation to a physician. One of the issues in that case was why the defendant-physician prescribed methadone for his patient, who subsequently died. Noting that a physician and a pharmacologist were both medical professionals, and that a physician would be familiar with issues relating to drug dosage and usage in a way overlapping a pharmacologist's knowledge, the Court, nevertheless, found that a pharmacologist neither practiced medicine nor prescribed medication. The Court also found that an analysis of the

⁸ Solway argues that Dr. Villalba's citation to *Friedel v. Osunkoya* is inapposite because that case was factually dissimilar from this case.

⁹ See 994 A.2d at 760–64.

¹⁰ The Court cited and quoted, *inter alia*, *Young v. Key Pharms.*, *Inc.*, in which the Supreme Court of Washington ruled on the issue:

[[]A] physician's standard of care regarding proper dosages of medication is not within the scope of matters on which non-physicians are competent to testify. Although a pharmacist may be more familiar with the names of medication, the literature, and

statutory provisions relating to experts in medical negligence cases also yielded the same conclusion.¹¹

Unlike in Friedel, however, the Court does not find Hornberger's opinion to step into grounds that are strictly within a physician's purview. The relevant statute states that "[n]o person shall be competent to give expert medical testimony as to applicable standards of skill and care unless such person is familiar with the degree of skill ordinarily employed in the field of medicine on which he or she will testify."¹² Hornberger, in essence, is an expert in hospital administration and functioning; and the Court does not find that his opinion relating to a hospitalist's failure to follow up on an MRI constitutes a *medical* opinion as to that hospitalist's standard of care. Not every task that a physician performs in the course of his employment constitutes an action particular only to a physician and about which only another physician may opine. Admittedly, a hospitalist's failure to follow up on an ordered diagnostic imaging test constitutes a task that falls somewhere in between actions that are particular only to a physician, such as prescribing drugs, and actions that have a medical flavor, but do not necessarily require a physician, such as making available

perhaps the usual practice of physicians, a pharmacist is not competent to testify on the physician's standard of care for treatment using medication.

⁹⁹⁴ A.2d at 763 (citing and quoting 770 P.2d 182, 190 (1989)).

¹¹ Citing and quoting 18 *Del. C.* § 6853 and 18 *Del. C.* § 6854.

¹² 18 *Del. C.* § 6854 (emphasis added).

necessary medical records, files, or data. The Court finds, however, that an expert in hospital administration and functioning is competent to opine on a hospitalist's following through, or lack thereof, with his ordered tests.

Based on the foregoing, this Motion is **DENIED**.

Very truly yours,

/s/ Richard F. Stokes

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